Office - Supreme Court, U.S
FILED
MAY 7 1984
ALEXANDER L. STEVAS.
CLERK

No. 83-1649

In The
Supreme Court of the United States
October Term, 1983

FRANCIS A. BEIMERT,

Petitioner,

vs.

BURLINGTON NORTHERN INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DONALD E. ENGLE
RONALD W. EUBANKS
176 East Fifth Street
St. Paul, Minnesota 55101
(612) 298-2972

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

	Pages
Table of Authorities	i
Statement of the Case	1
Argument	3
Conclusion	17

TABLE OF AUTHORITIES

CASES

Cape Cod Food Products v. National Cranberry Association, 119 F.Supp. 900 (D. Mass. 1954) 6

Chicago and North Western Railway Company v. Rieger, 326 F.2d 329 (8th Cir. 1964), *cert. den.*, 377 U.S. 917 (1964) 10

Coughlin v. Capitol Cement Company, 571 F.2d 290 (5th Cir. 1978) 14

Davis v. Wolfe, 263 U.S. 239 (1923) 11

Dunn v. St. Louis-San Francisco Railway Company, 370 F.2d 681 (10th Cir. 1966) 9

Hardigg v. Inglett, 250 F.2d 895 (4th Cir. 1957) 11

Johnson v. Chicago Great Western Railway Company, 242 Minn. 130, 64 N.W.2d 372 (1954) 16

Krasowski v. Greyhound Lines, Inc., 402 F.2d 445 (6th Cir. 1968) 7

McCullough v. Beech Aircraft Corporation, 587 F.2d 754 (5th Cir. 1979) 13

Miller v. Gulf, M. & O. R.R., 386 S.W.2d 97 (Mo. 1964) 16

Parson v. Illinois Bell Telephone Company, 481 F.2d 458 (7th Cir. 1973) 13

Price v. Glosson Motor Lines, Inc., 509 F.2d 1033 (4th Cir. 1975) 9

TABLE OF AUTHORITIES—Continued

	Pages
Puggioni v. Luckenbach Steamship Company, 286 F.2d 340 (2nd Cir. 1961)	10
Quercia v. United States, 289 U.S. 466 (1933)	6, 7
Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500 (1957), *reh. den.*, 353 U.S. 943 (1957)	11
Rohner, Gehrig & Company v. Capital City Bank, 655 F.2d 571 (5th Cir. 1981)	10
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980)	13
Texas and Pacific Railway Company v. Jones, 298 F.2d 188 (5th Cir. 1962)	13
United States v. Mercks, 304 F.2d 771 (4th Cir. 1962)	7
Vicksburg Furniture Manufacturing v. Aetna Cas. & Sur. Co., 625 F.2d 1167 (5th Cir. 1980)	14
Virginian Ry. Co. v. Armentrout, 166 F.2d 400 (4th Cir. 1948)	7
Williams v. Independent News Company, Inc., 485 F.2d 1099 (3rd Cir. 1973)	11
Woodward v. United States, 185 F.2d 134 (8th Cir. 1950), *rev'd. on other grounds*, 341 U.S. 112 (1951)	6

STATUTES

45 U.S.C. §§51-60	1
45 U.S.C. §§1-16	1

RULES

Rule 51, Federal Rules of Civil Procedure	9, 10

No. 83-1649

In The
Supreme Court of the United States
October Term, 1983

FRANCIS A. BEIMERT,

Petitioner,

vs.

BURLINGTON NORTHERN INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Petitioner Francis A. Beimert brought an action pursuant to the Federal Employers' Liability Act, 45 U.S.C. Sections 51-60, and the Federal Safety Appliance Act, 45 U.S.C. Sections 1-16, for injuries allegedly suffered dur-

ing the course of his employment with respondent Burlington Northern Railroad Company[1] on April 30, 1981, in Minneapolis, Minnesota. The case was venued in the United States District Court, District of Minnesota, before the Honorable Edward J. Devitt. The trial took place on December 7, 1982. The jury returned a verdict for respondent on the morning of December 8, 1982. Petitioner appealed the verdict and judgment of the trial court to the United States Court of Appeals for the Eighth Circuit, which affirmed the judgment of the trial court by a *per curiam* opinion filed on February 2, 1984. A copy of the Eighth Circuit opinion may be found in the Appendix to petitioner's brief.

Petitioner has presented a lengthy statement of the case to the Court in his Petition for a Writ of Certiorari. The length of petitioner's exposition belies the simplicity of the facts involved in this case. For that reason, respondent finds it necessary to briefly restate the facts herein.

Petitioner Francis A. Beimert commenced his employment with respondent in February, 1973. (IV. Tr. 52) On the date of his alleged injury, April 30, 1981, petitioner was engaged in his duties as a carman inspecting cars on Track 9 at respondent's Northtown Yards in Minneapolis,

---

[1] The following is a list of the parent company and its subsidiaries pursuant to Rule 28.1 of the Supreme Court Rules. Parent Company: Burlington Northern Inc. Subsidiaries: Burlington Northern Railroad Company; BN Transport Inc.; El Paso Exploration Company; El Paso Hydrocarbons Company; El Paso Natural Gas Company; Glacier Park Company; Meridian Land and Mineral Company; Milestone Petroleum Inc.; and Plum Creek Timber Company, Inc.

Minnesota. (IV. Tr. 53-55) He noticed that one of the cars had a bent handhold, and made the decision to attempt to repair the handhold with an all purpose repair bar, commonly known as a brakeshoe bar, which he was carrying. Petitioner inserted the bar between the handhold and the car and pulled down in an effort to straighten the handhold. The bar slipped and struck petitioner in the head, allegedly causing the injuries for which he sought damages. (IV. Tr. 55-56, 69) Petitioner testified that his only object was to repair the defect and that he was not attempting to use the handhold for any purpose. (IV. Tr. 62)

ARGUMENT

I. The Trial Court properly instructed the jury on the applicable law and specifically left the issue of causation for determination by the jury.

The entire trial of this action took place on December 7, 1982. The trial judge charged the jury on that date but, since they were unable to return a verdict, the jury resumed deliberations on the morning of December 8, 1982. (IV. Tr. 148) At 9:15 a.m. on December 8, the jury returned to the courtroom and requested additional instructions. In his brief, petitioner has excerpted a small portion of the additional instructions given by the trial court. This excerpt, taken out of context, is cited by petitioner in support of his contention that he was deprived of a trial by jury. An examination of the full text of the trial court's supplemental remarks to the jury reveals that the

trial judge did not deprive petitioner of his right to a trial by jury.

THE COURT: Good morning, jurors.

Well, I have a message from the Forelady which reads: "Please repeat Safety Appliance Act law instructions."

And then the next sentence, numbered Question 2: "When is the Act violated?"

Signed by the Forelady.

And I'll try to help you by repeating the instructions which I have previously given. If you will listen closely, I'll read for you a quote as to just how the Safety Appliance Act reads.

"It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

If you should find from the greater weight of the evidence that the defendant violated the provisions of the Federal Safety Appliance Act, as alleged, and that the violation played any part, no matter how small, in bringing about or actually causing injury to plaintiff, then the plaintiff is entitled to recover from the railroad such damages as the Jury shall find from a preponderance of the evidence that the plaintiff actually sustained as a result of the violation, without any requirement of a showing of negligence on the part of the defendant.

You are further instructed that contributory negligence by the plaintiff is not a defense in whole or in part to damages caused by a violation of the Federal Safety Appliance Act.

And you will recall that I previously also instructed you that the plaintiff, the party who brings a lawsuit,

has the burden of proof. He must prove it. So, this plaintiff must prove by evidence which is more persuasive to you than the evidence on the other side that he is entitled to recover.

So, basically what the plaintiff must do—if I can visit with you for a moment and see if I can be of some help to you in it, basically what the plaintiff must do is to prove to you by the greater weight of the evidence, more persuasive evidence to your minds, that, number one, this Safety Appliance Act was violated because they had a deficient grab iron there, and number two, that that deficient, or twisted iron was the cause of the injury. Plaintiff says it was. He says that's why he was injured this way. And the defendant says, no, no, as I understand his argument and his evidence.

The purpose of this law is to protect people who are using it, like—what does the law say? ". . . greater security to men in coupling and uncoupling cars."

But in this case, it wasn't being used. The very purpose for this plaintiff being there was to check to see that everything was okay, and when they came and found it deficient, he was supposed to be repairing it. So, it wasn't as a result of the deficiency in that hand iron that the injury came; it was because of the way in which this plaintiff attempted to fix it.

So, it's those two things. There must be a violation of the Act. There is no question that that was a deficient hand iron. No one claims otherwise, I don't think. They both seem to agree to that. I think the big question is: Did that cause his injury? Did that cause the injury? Was that a proximate cause? Did it have something to do about bringing it about? (IV. Tr. 148-150)

When viewed as a whole, the trial court's supplemental instructions correctly stated the applicable law on liability under the Federal Employers' Liability Act and the Fed-

eral Safety Appliance Act, and simply restated the arguments of both petitioner and respondent. The trial court did not, as petitioner alleges, argue respondent's case to the jury and in effect direct a verdict for respondent. The trial judge was simply exercising his established right to explain and comment upon the evidence presented at trial.

> In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he must make it clear to the jury that all matters of fact are submitted to their determination.
>
> *Quercia v. United States,* 289 U.S. 466, 469 (1933).

The Judge's function is not merely to repeat the instructions, but to endeavor to make them understandable to the jurors. *Cape Cod Food Products v. National Cranberry Association,* 119 F.Supp. 900, 907 (D. Mass. 1954).

Such comments are proper if they fall short of advocacy, and the jurors are left free to perform their functions as judges of the facts, credibility of witnesses, and weight of the evidence. *Woodward v. United States,* 185 F.2d 134, 137 (8th Cir. 1950), *rev'd on other grounds,* 345 U.S. 112 (1951).

It is clear that the comments made by the trial judge in this case amounted to no more than a summary of the evidence and arguments of both petitioner and respondent in an effort to clarify the issues for an inquiring jury. Petitioner, in an effort to find error in the comments of the trial judge, has lifted a portion of those comments out

of context. The meaning of the additional instructions can best be ascertained within the context of the entire charge to the jury. *United States v. Mercks*, 304 F.2d 771, 772 (4th Cir. 1962).

The cases cited by petitioner in support of his contention that the comments of the trial judge in the instant case were improper can be easily distinguished. In *Quercia v. United States, supra*, the trial judge prefaced his comments by stating: "And now I am going to tell you what I think of defendant's testimony." He then proceeded to describe in detail the defendant's incidental behavior while testifying, i.e., nervous wiping of his hands. 289 U.S. at 468.

In *Krasowski v. Greyhound Lines, Inc.*, 402 F.2d 445 (6th Cir. 1968), the trial judge made a number of clearly prejudicial comments, including the following: "If he had but very little distance, whose fault is that? Wasn't he the driver? There is an axiom, 'Leave the driving to us.' Well, it was left to him, and you are going to have to judge what you think of how he drove." *Id.*, at 447. This comment was not an isolated instance, but reflected the attitude of the trial court throughout the proceedings.

In *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948), the trial judge made a number of comments which were clearly prejudicial to the defendant railroad. The appellate court recognized that "It is proper, of course, for the judge to array the evidence and comment upon it; but what the law envisions in this regard is judicial comment fairly explaining to the jury the contentions of the parties with respect to the evidence, not

argument by the court in support of contentions." *Id.* at 405.

It is clear from a reading of the entire text of the trial court's remarks that the trial judge in the instant case was simply explaining the contentions of the parties to the jury and was not advocating one view over the other. It is also clear from the last paragraph of the additional instructions that the issue of causation was properly submitted to the jury. The mere fact that the verdict was returned twenty-three minutes after the additional instructions were given by the trial judge should not be accorded any special significance. It reflects nothing more than the simplicity of the issue presented for the jury's determination, i.e., whether or not a violation of the Safety Appliance Act had caused, in whole or in part, petitioner's injury. The trial judge's comments were not erroneous and did not take the issue of causation from the jury. Therefore, petitioner was not denied his right to a jury trial and the Petition for a Writ of Certiorari should be denied.

II. The Trial Court properly apprised counsel of the instructions it intended to give and those instructions were fully consistent with the applicable law.

Both petitioner and respondent submitted written requests for instructions. (R. 11-73) At the close of respondent's case, and before final arguments to the jury, the trial judge reviewed the proposed instructions and informed counsel as to which of the written instructions he would give:

> THE COURT: And that's the railroad's 15C? I'll give that.

> It seems to me that the supplemental instructions which each of you gave me are all right, and they each seem to cover about the same subject. For instance, I'd give the gist of Plaintiff's Number 15, of Plaintiff's Number 9, Plaintiff's Number 7, Plaintiff's Number 8, and the gist of the last one of the group, which isn't numbered, which we might call Number 100, maybe.
>
> And the same thing seems to be true to me to defendant's supplemental requested instructions; the railroad's Number 8A is about the same thing as Plaintiff's 15, which I would expect to give. The railroad's Number 8B seems to be the same as Defendant's 15, which I would give. I don't expect to give the supplemental one about 8C. I think that's a little bit by way of argument. (IV. Tr. 105)

Rule 51 of the Federal Rules of Civil Procedure states in part:

> At the close of the evidence or at such earlier time during trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the request. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury. . . .

In complying with Rule 51 "The court may inform counsel in general terms suitable to this purpose, and need not, and we think should not, do so in a sentence by sentence outline." *Dunn v. St. Louis-San Francisco Railway Co.*, 370 F.2d 681, 683 (10th Cir. 1966). The form and extent of jury instructions are within the discretion of the trial court. *Price v. Glosson Motor Lines Inc.*, 509 F.2d 1033, 1036 (4th Cir. 1975).

The trial judge is not required to incorporate every proposition of law suggested in counsel's requests. It is only necessary that he cover the specific principles neces-

sary for the jury's decision. *Puggioni v. Luckenbach Steamship Co.*, 286 F.2d 340, 344 (2nd Cir. 1961).

Rule 51 does not require the judge to give a verbatim rendition of a party's written instructions, or to give the requesting party a written transcript of his proposed charge to the jury. As the Eighth Circuit Court of Appeals has held:

> The court must only set out the law in a form not misleading to the jury.
>
> • • •
>
> The requirement is that the court give the substance of the requested instruction if it soundly appears that the instruction is needful to enable the jury to intelligently determine the question.
>
> *Chicago and North Western Railway Co. v. Rieger*, 326 F.2d 329, 335-336 (8th Cir. 1964), cert. denied, 377 U.S. 917 (1964).

The trial judge has great discretion in selecting his own words and instructing the jury in his own style. *Rohner, Gehrig & Company v. Capital City Bank*, 655 F.2d 571, 580 (5th Cir. 1981).

It is clear from the quoted portion of the transcript, *supra*, that the trial court did more than give petitioner's counsel a general idea of the instructions which it would give. The trial judge pointed specifically to the requested instructions which he planned to give. Thus, the trial court complied fully with the requirements of Rule 51.

Petitioner also alleges that it was error for the trial judge to instruct the jury as follows:

> I advise you that the mere happening of an accident causing injuries to a person does not automatically

> make his employer or anybody else liable. Accidents frequently happen for which you can't assess the cause. (IV. Tr. 138)

This instruction was not erroneous. A violation of the Safety Appliance Act only relieves the plaintiff of the burden of proving negligence on the part of his employer. The plaintiff is still required to prove that the violation of the Act was a cause of the injury. *Davis v. Wolfe,* 263 U.S. 239, 243 (1923); *Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500 (1957), *reh. denied,* 353 U.S. 943 (1957). The jury in the present case was faced with three possibilities: (1) That the alleged violation of the Safety Appliance Act was a contributing cause of the petitioner's injury; (2) That the petitioner's injury was caused solely by the petitioner himself, or some other agency; or (3) That the injury was a mere accident, without any ascertainable cause. Thus, the instruction was proper and was consistent with the standard of causation under the Safety Appliance Act.

The fact that the trial judge did not discuss the added instruction with counsel does not constitute reversible error unless petitioner was materially prejudiced. *Hardigg v. Inglett,* 250 F.2d 895, 897 (4th Cir. 1957). Clearly, petitioner was not materially prejudiced by the addition of this instruction. The charge given was a standard rendition of instructions under the Federal Employer's Liability Act and the Safety Appliance Act. Reversible error on the ground of prejudice to a party is not committed when it is clear that the appellant is advised prior to final argument as to the critical instructions which are ultimately delivered by the court. *Williams v. Independent News Company Inc.,* 485 F.2d 1099, 1106 (3rd Cir. 1973).

Thus, the trial judge did not commit reversible error and the Petition for Writ of Certiorari should be denied.

III. The Trial Court properly instructed the jury on the issue of causation and did not err in giving respondent's instruction no. 8B.

In charging the jury, the trial judge gave the substance of respondent's requested instruction 8B. As enunciated by the trial court, that instruction stated:

> In order for you to find for the plaintiff under this law, the plaintiff must show by the preponderance of the evidence, the greater weight of the evidence, not only that there was a violation of the Safety Appliance Act, but also that the violation caused the plaintiff's injury. If the injury resulted from some other cause, or as a result solely of the plaintiff's own conduct, then, of course, you must find for the defendant. (IV. Tr. 140)

Petitioner alleges that the giving of this instruction amounted to reversible error in that it was not an accurate statement of the law, and because it improperly introduced contributory negligence as a defense. However, the plain meaning of the instruction goes to the issue of causation, and does not in any way refer to contributory negligence. The language of the instruction simply states that if petitioner's injury was caused *solely* by the acts of either the petitioner or some other agency, then there can be no recovery under the Safety Appliance Act. This is consistent with the other instructions given by the trial judge. There is no reference to contributory negligence contained in the instruction. As the Seventh Circuit Court of Appeals has pointed out, "The test of instructions is not how the meaning can be changed by the ingenuity of counsel's interpretation, but what the ordinary man act-

ing as a juror will, in the context of all the instructions understand." *Parson v. Illinois Bell Telephone Co.*, 481 F.2d 458, 460 (7th Cir. 1973). The plain meaning of the above quoted instruction is simply that the alleged violation of the Safety Appliance Act must in some way have been a cause of plaintiff's injury. This becomes very clear when the instructions are viewed as a whole.

An appellate court, in reviewing instructions, should examine the common sense meaning imparted thereby to the jury. *Taxes and Pacific Railway Co. v. Jones*, 298 F. 2d 188 (5th Cir. 1962). The test is whether or not the jury was misled in any way, and whether it had an understanding of the law necessary to determine the issues. *McCullough v. Beech Aircraft Corporation*, 587 F.2d 754, 759 (5th Cir. 1979).

In order to correctly determine whether the jury was properly instructed, the instructions as a whole must be examined. As has been stated by the Fourth Circuit: "We commence our review by recognizing that the appellate court, when assessing the adequacy of jury instructions, is guided by the rule that the instruction should be viewed as a whole." *Smith v. University of North Carolina*, 632 F.2d 316, 332 (4th Cir. 1980).

The question whether a trial court has committed reversible error in its instructions has been succinctly addressed by the Fifth Circuit:

> In reviewing allegations of error in the trial court's instructions to the jury, we must determine whether the charge, considered as a whole, instructed the jurors so that they understood the issues to be tried and were not misled. . . . There is no error if the instructions, when taken together, properly express the law

> applicable to the case, even though an isolated clause is inaccurate, ambiguous, incomplete, or otherwise subject to criticism.
>
> *Vicksburg Furniture Manufacturing v. Aetna Casualty Assurety Company,* 625 F.2d 1167, 1169 (5th Cir. 1980).

That court has also stated that "It is axiomatic that the court need not couch its charge in the precise language and form fancied by a litigant's attorney." *Coughlin v. Capital Cement Company,* 571 F.2d 290, 300 (5th Cir. 1978).

A review of the entire charge to the jury in the instant case clearly indicates that the trial court did not improperly instruct the jury on the law, nor introduce the issue of contributory negligence as a defense. The trial court clarified the term "proximate cause" to the jury: "We have been using that term, 'proximate cause.' It means some cause that had something to do about bringing about the accident." (IV. Tr. 138-139) The trial judge then read verbatim Section 4 of the Safety Appliance Act. (IV. Tr. 139). Then the trial court charged the jury with the substance of petitioner's requested instruction 15:

> If you should find from the greater weight of the evidence that the defendant violated the provisions of the Federal Safety Appliance Act and that the violation played any part, no matter how small, in bringing about or actually causing the injury to the plaintiff, then the plaintiff is entitled to recover from the railroad such damages as the jury shall find from the greater weight of the evidence that the plaintiff actually sustained as a result of the violation, without any requirement of a showing of negligence on the part of the defendant.

> You are further instructed that contributory negligence by the plaintiff is not a defense in whole or in part to damages caused by a violation of this law. (IV. Tr. 139-140)

The substance of this instruction was again given to the jury in the trial court's additional instructions on the morning of December 8, 1982. (IV. Tr. 148-149)

Respondent's counsel also specifically advised the jury in his final argument that he was not relying upon the defense of contributory negligence:

> Mr. Schum [petitioner's attorney] has indicated to you that we're not talking about contributory negligence in this case. And that is certainly true. What we're talking about here is cause. What was the cause of this injury? (IV. Tr. 129)

Therefore, from a reading of the jury instructions as a whole, it is clear that the jury was not misled in regard to the issues of causation and the inapplicability of the defense of contributory negligence. The jury was clearly instructed that the term "proximate cause" as used in the context of this trial meant a *cause,* and not *the* cause. The jury was also instructed that if the violation of the Safety Appliance Act was a cause in any way, no matter how small, of petitioner's injury, then the respondent would be liable. The jury was also specifically instructed on two occasions that contributory negligence was not a defense in while or in part to petitioner's complaint.

It is quite clear that the jury instructions given by the trial court in the instant case crystalized for the jury the central and only issue for their determination, i.e., causation. Thus, it is evident that the trial court's instructions to the jury were proper, that the jury was not

misled, and that no reversible error was committed by the trial court.

IV. Respondent did not interpose contributory negligence as a defense to the Safety Appliance Act and the Trial Court did not commit reversible error in admitting any of respondent's evidence.

Respondent's defense to petitioner's allegations at trial was that the petitioner's act in attempting to repair the handhold comprised the sole cause of the accident. In final argument, respondent's counsel specifically told the jury that contributory negligence was not an issue in this case:

> Mr. Schum [petitioner's attorney] has indicated to you that we're not talking about contributory negligence in this case. And that is certainly true. What we're talking about here is cause. What was the cause of his injury? (IV. Tr. 129)

Respondent's theory was simply that if petitioner's action was the *sole* cause, then the violation of the Safety Appliance Act could not have contributed in whole or in part to the injury. *Miller v. Gulf, M. & O. R.R.*, 386 S.W.2d 97, 101 (Mo. 1964); *Johnson v. Chicago Great Western Ry.*, 242 Minn. 130, 136, 64 N.W.2d 372, 377 (1954). All the evidence presented by respondent was consistent with its argument of sole cause. Therefore, the trial court did not commit reversible error in overruling petitioner's objections to the admission of said evidence, and the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Petitioner was clearly not denied his constitutional right to a trial by jury. The only issue for determination by the jury at trial was causation. The trial court's instructions clearly stated that respondent would be liable if the violation of the Safety Appliance Act caused, in whole or in part, the injuries suffered by petitioner. The sufficiency of the trial court's instructions on this issue becomes clear when the charge is viewed as a whole. The issue of causation went to the jury, which returned a verdict for respondent. That jury verdict should not be disturbed.

The trial court complied fully with the requirements of Rule 51 of the Federal Rules of Civil Procedure. Petitioner's counsel was apprised of the specific instructions which would be given to the jury during the instruction conference. The trial judge was not required to repeat the requested instructions verbatim, but was only required to give the substance of those instructions, which he did. Petitioner cannot argue that the additional instruction materially prejudiced his case. That instruction concerned causation, an issue which he fully argued during the trial and in his closing statement to the jury. The additional instruction was also perfectly consistent with the theories of causation as presented by both petitioner and respondent throughout the trial.

The trial court did not commit reversible error by giving respondent's requested instruction 8B. Instruction 8B simply stated that in order for the jury to find for petitioner, petitioner was required to meet his burden of proving that the violation of the Safety Appliance Act was a

cause in some way of petitioner's injury. The instruction also stated that if the jury found that petitioner's injuries were caused solely by some other cause, or petitioner's own conduct, then they must return a verdict for respondent. Instruction 8B was totally consistent with the law under the Federal Employers' Liability Act and the Safety Appliance Act, and was also consistent with the charge as a whole. It did not, as petitioner alleges, inject the issue of proximate cause into the trial. The trial judge himself instructed the jury that the term "proximate cause," as used during the trial, meant a cause that in any way, no matter how small, resulted in petitioner's injury. Thus the instruction was proper.

Respondent did not interpose the defense of contributory negligence to a violation of the Safety Appliance Act. Respondent's sole defense during trial was based on causation. This defense is consistent with federal law, which requires that a plaintiff not only prove that the Safety Appliance Act was violated, but also that that violation was a cause in some manner of the employee's injuries. Respondent simply argued that if the accident was caused solely by either petitioner or some other agency, then the violation of the Act could not have been a cause in any degree, and a verdict for respondent would be proper. The trial judge instructed the jury that contributory negligence was not an issue in the trial. Respondent's counsel in final argument also told the jury that contributory negligence was not an issue. Thus, contributory negligence was never argued to the jury, and the trial judge did not commit reversible error in admitting any of respondent's evidence.

It is clear from a reading of the opinion issued by the Eighth Circuit Court of Appeals that that Court addressed all the issues raised by petitioner on appeal. Both the trial court and the appellate court fulfilled their responsibilities fully to both petitioner and respondent. The trial court committed no reversible error, and the appellate court did not breach any duty by affirming the judgment of the trial court. Therefore, respondent respectfully requests that the Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals be denied.

Respectfully submitted,

DONALD E. ENGLE
RONALD W. EUBANKS
176 East Fifth Street
St. Paul, Minnesota 55101
(612) 298-2972

Attorneys for Respondent

Dated: May 4, 1984

END OF DOCKET